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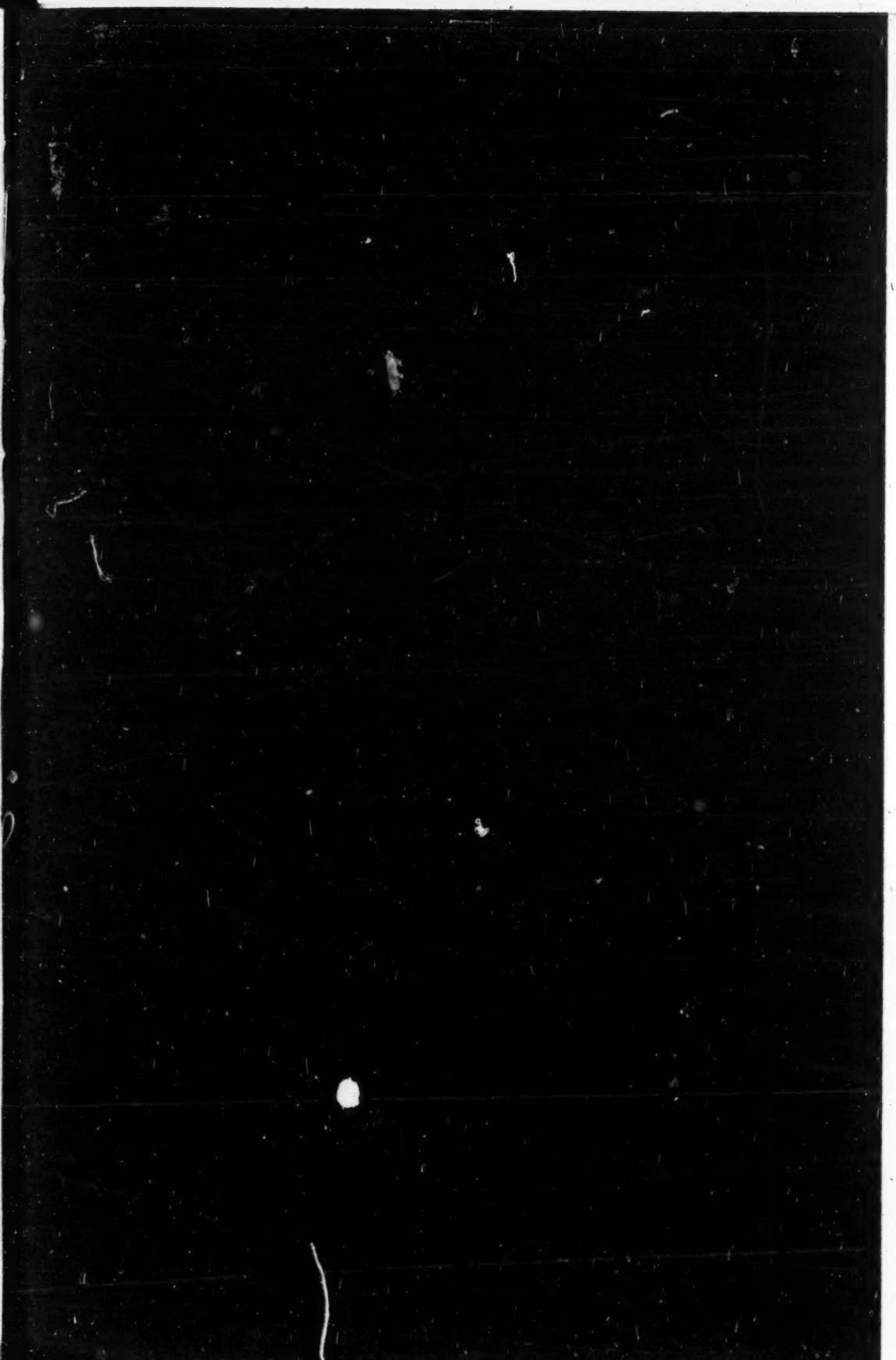

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 14, ORIGINAL

FORREST HOLIDAY, PETITIONER

v.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The Circuit Court of Appeals denied the petitioner's application for leave to appeal in *forma pauperis* without opinion (R. 76). The order of the District Court approving the report of the United States Commissioner and denying without opinion the application for a writ of habeas corpus appears at R. 66. The District Court's order denying the motion for leave to appeal in *forma pauperis* to the Circuit Court of Appeals and certifying that there is no merit in the application for appeal appears at R. 68–69.

JURISDICTION

The order of the Circuit Court of Appeals denying the petitioner's application for leave to appeal in *forma pauperis* was entered September 5, 1940 (R. 76). The application for leave to file a petition for certiorari and to proceed in *forma pauperis* was received October 21, 1940. The application and the petition for certiorari were both granted March 3, 1941. Although the petition invoked the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925, it seems clear that jurisdiction must be invoked under Section 262 of the Judicial Code (U. S. C., Title 28, Sec. 377). See *In re 620 Church Street Corporation,* 299 U. S. 24, 26.

QUESTIONS PRESENTED

1. Whether the application for a writ of *habeas corpus* was premature in so far as it attacked the cumulative sentences imposed upon the two counts of the indictment, neither sentence having been served.

2. Whether an application alleging that the petioner, who pleaded guilty to an indictment charging armed bank robbery, did not know and was not informed of his right to the assistance of counsel and was not represented by counsel states a *prima facie* case of detention in violation of the Sixth

Amendment and calls for the issuance of a writ of *habeas corpus.*

3. Whether the petitioner's testimony before the United States Commissioner is to be regarded as an elaboration of his application and, if so, whether the testimony sufficed to state a case of coercion or deception.

4. If the rule to show cause developed a material issue of fact, whether the District Court erred in issuing a writ of *habeas corpus* returnable before a United States Commissioner, the function and effect of the procedure being to refer the issues to the Commissioner to hear the testimony and find the facts.

5. Whether, in other respects, the procedure infringed the petitioner's substantial rights.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant provisions of the Constitution, statutes and rules are set forth in the Appendix.

STATEMENT

On May 8, 1939, petitioner filed in the United States District Court for the Northern District of California, Southern Division, a petition for a writ of habeas corpus, alleging that he is unlawfully imprisoned in the United States Penitentiary at Alcatraz, in the custody of the respondent (R. 1–3).

The amended petition, signed by petitioner's attorney (R. 3) and accompanying exhibits (R. 3–9)

showed that petitioner was indicted on September 24, 1936, in the United States District Court for the District of North Dakota, Northeastern Division. The indictment, based on U. S. C., Title 12, Section 588 b (R. 3–5) charged, in the first count, that on May 27, 1936 the defendant (named as James Thomas) and two accomplices robbed the Farmers State Bank of Maddock, North Dakota, an insured bank; and, in the second count, that in the course of the robbery they put in jeopardy the lives of the officers of the bank with an automatic pistol. Petitioner pleaded guilty to both counts on October 13, 1936 (R. 1, 5) and was sentenced to ten years' imprisonment upon the first count and fifteen years upon the second, the sentences to run consecutively (R. 1, 8–9). The record recites, with respect to each sentence, that the defendant was asked "to show cause, if any he have, why sentence should not now be pronounced against him" and that no cause was shown (R. 8).

The petition alleged that the judgment and sentence were unlawful for the reason that petitioner did not "have the advice and assistance of counsel", "the trial court did not advise or inform him that he was entitled to counsel", he "did not know that he was entitled to or could have the advice or assistance of counsel in the absence of his ability to pay for the same" and "because of the above premises" he "was not able to and did not make an intelligent or competent waiver of his constitutional

right". The petition also alleged that the two counts of the indictment charged but one offense, with the result that he was placed in double jeopardy by the consecutive sentences (R. 2).

Upon the filing of the petition, the District Court issued an order directing the respondent to show cause why a writ of habeas corpus should not issue (R. 9). The respondent filed a return to the order, praying that the petition for a writ of habeas corpus be dismissed and incorporated, in addition to the indictment, judgment, sentence, commitment, docket entries (R. 11–12) and transfer order (R. 12–15), the certificate of Andrew Miller, Judge of the District Court for the District of North Dakota (R. 15) and the affidavit of Angus Kennedy, Deputy Marshal for the same district (R. 15–16).

The certificate of Judge Miller set forth that he had been a District Court Judge for seventeen years; that it had always been his "uniform practice to inquire of defendants appearing before" him, without counsel and charged with the commission of felonies, "whether or not they desired counsel, and if so to offer to appoint counsel"; that he had no independent recollection of the petitioner's case, but that in view of his "long established practice in such cases and the fact that" he imposed a long prison sentence, he was "positive to a moral certainty" that he did ask the petitioner "whether or not he desired to be

represented by counsel before" permitting the plea of guilty to be entered.

The affidavit of Angus Kennedy set forth that he is a Deputy Marshal for the District of North Dakota; that he and the United States Marshal transported petitioner on October 22, 1936, from Fargo, North Dakota, to McNeil Island, Washington, under a commitment of the United States Court for the District of North Dakota (R. 15); that during the course of this trip, the petitioner expressed the view that he had not been accorded "fair treatment by the government agent who investigated his case and to whom he had admitted his guilt" (R. 16) because the agent had promised him he would receive a sentence not to exceed 25 years, when in fact he did not receive a straight 25-year sentence, but a sentence of 10 years on the first count of the indictment and 15 years on the second; that this meant he would have to serve a full 10-year sentence and the required portion of the 15-year sentence before he would be eligible for parole; that the affiant asked the petitioner why he did not have an attorney and the petitioner answered that he had no use for an attorney; that he would have been satisfied had he received the sentence promised, and that he did not go to trial because he feared certain facts might transpire that would not be for his best interest; that the petitioner said "I knew I would get the book thrown at me" (R. 16).

The petitioner filed a traverse (R. 16–18) dated July 31, 1939, denying that Judge Miller asked him whether or not he wished to be represented by counsel, that he had told Kennedy that he had no use for an attorney, that he would have been satisfied had he received the straight 25 year sentence and that he did not go to trial because he feared "the book would be thrown" at him (R. 18).

On December 14, 1939, the District Court issued a writ commanding the respondent to have the body of the petitioner before the United States Commissioner for the Northern District of California, Southern Division, at the Administration Building of the United States Penitentiary at Alcatraz, on December 16 (R. 18).

The Commissioner held a hearing on December 19, at which petitioner appeared with his counsel and gave the following testimony:

He was arrested in Excelsior Springs, Missouri, on September 21, 1936 by two agents of the Federal Bureau of Investigation, who took him to Kansas City (R. 37–38, 43). In Kansas City he was held in the county jail and removal proceedings were instituted against him (R. 38). He retained counsel, to whom he paid a fee of $100 (R. 44–46, 52–55). His attorney was with him on two of the three occasions on which he appeared before the United States Commissioner in the removal proceedings (R. 46). The charges in the indictment were read to him before the Commis-

sioner (R. 55) and he understood that the charge was bank robbery (R. 48). When petitioner's attorney learned of the indictment, he said that he could be of no assistance (R. 44, 55), that he "might as well go to North Dakota" (R. 54). After his attorney had given him this advice (R. 44, 62), two Department of Justice agents, who had appeared on several occasions (R. 38), told him that unless he consented to removal and signed a statement they would give him "approximately 80 years" and, if he had any witnesses, would see that "they got ten years" (R. 38). The agents "marked down 25, 25, 10 and 10 and 10 on a piece of paper" (R. 61). They did not say what the charges were (R. 61–62) but explained that "all these 10 years were to be for the various state lines" he crossed (R. 63). The agents also said that if he would sign the waiver and the statement they would recommend that he get only ten years (R. 38, 63). Under these threats and on this representation, he signed a consent to removal (R. 44, 62, 36, Resp. Ex. 1, R. 32–33) and a statement that "he was implicated in the robbery of the Maddock Farmers State Bank May 26th, 1936" (R. 48, 36, Resp. Ex. 8, R. 33). The waiver recited that he executed it of his "own free will, and without any pressure, compulsion or coercion of any kind whatsoever"; the statement recited that it was made "of my own free will with no threats or promises being made me" (R. 33).

Petitioner testified that he did not discuss the waiver and statement with his attorney (R. 47). He does not now know whether he actually thought he would be sentenced to a term of 80 years (R. 62). From previous experience he knew that he would have to be convicted before he was sentenced and that the charges against him would have to be proved. But he did not know "what charges they could put against" him or "how much time" he "could get" (R. 63). He did know that the indictment charged robbery (R. 48). The discussion with the agents did not relate to what plea he should enter but to the statement he should sign for them (R. 64, 45; but cf. R. 61). The agents involved were those whose names are attached to the waiver (R. 39, 45).

Petitioner's discussion with his attorney related only to extradition. They did not speak of the robbery, of petitioner's guilt or innocence, of the substance of the indictment or of the course he should follow when he arrived in North Dakota (R. 52–55). He did tell the attorney that he was in Minnesota at the time of the robbery charged but when the attorney asked for the names of witnesses to prove this, petitioner gave him none (R. 53–54). Though he was held in a ward with other federal prisoners in Kansas City, he did not discuss his case or their cases with any of them (R. 46).

After consenting to removal, he was taken to Fargo by a United States Marshal and a Deputy

Marshal (R. 39). In Fargo he was confined alone, had no visitors and was not interviewed by representatives of the Government. (R. 39, 47.) He had approximately $20 on his person (R. 40, 52) but did not consult an attorney or make any effort to do so (R. 39, 41). About four days after his arrival he was brought into court (R. 39). Three or four prisoners were sentenced before his case was called (R. 48). The indictment was not read to him by the clerk (R. 40) but both counts were read to him by the United States attorney or his assistant (R. 50) and the judge explained that he was charged with robbing a bank in North Dakota (R. 49). He knew the nature of the charges and pleaded guilty to both counts (R. 50). When the second count was read, petitioner hesitated and the judge "instructed that anyone who was guilty of any part of it, was guilty of all" (R. 51). Then he pleaded guilty to the second count. The judge asked if he had anything to say before being sentenced. He replied "nothing" (R. 51). An F. B. I. agent, whom he had never seen, made a statement to the court about his criminal record but did not recommend leniency (R. 47, 64).

Petitioner testified, further, that neither the judge nor the United States attorney asked him whether he desired to be represented by counsel or advised him of his right to counsel (R. 40). He did not know that he had a right to have counsel unless he could pay a fee, and he had only $20, not enough to retain a lawyer (R. 40–41). He had been ar-

rested six or eight times before (R. 58), had appeared in court twenty years ago in Oklahoma (R. 43) on a vagrancy charge (R. 57–58), was convicted of larceny in Wisconsin in 1926 (R. 42, 58), after being extradited from North Dakota (R. 42, 58). On the latter charge he was represented by counsel both in the extradition proceeding and at the trial (R. 42, 58). He received a sentence of one to ten years, served six months in the state penitentiary and three years in the reformatory (R. 59). During none of these earlier experiences was he advised or did he learn of a right to counsel without payment of a fee (R. 43). He had read of public defenders being appointed in murder trials but he thought, before going to Alcatraz, that it was only in that case that counsel could be appointed without funds. He first learned of defenders in other cases when in Alcatraz he read the decision in *Johnson* v. *Zerbst* (R. 59). His formal education was one year in high school. But he had done considerable reading on scientific subjects and in all types of fiction, including the classics and Shakespeare (R. 57). And while he was in the Wisconsin Reformatory, he took an extension course from Wisconsin University in automobile mechanics (R. 59–60). At the time of the hearing before the Commissioner he was nearly 37 years old (R. 63).

After his sentence in Fargo, he was taken to McNeil Island, Washington by Deputy Marshal Kennedy (R. 41). He did not converse with Ken-

nedy *en route* about his failure to have an attorney represent him (R. 41) or to stand trial (R. 42). Their only conversation occurred upon leaving the court room when Kennedy asked him if he did not know of the second count until it was read. He replied that that was the first time he had heard of it (R. 60). He never told Kennedy that the Government agents had promised him a sentence of not more than twenty-five years, that he would have been satisfied had he received the sentence promised him (rather than cumulative sentences of ten and fifteen years), that he had no use for an attorney or that he did not stand trial because he feared that he would "get the book thrown at" him (R. 61).

The Commissioner asked him whether he recalled what the first count of the indictment was. He replied "I was charged in the words of the statute 'taking by force, fear and violence a certain sum of money'" (R. 63). To a similar inquiry with respect to the second count, he replied: "the second count, as I recall, from the indictment, was that in committing the first offense I put in jeopardy, the lives of the bank officials" (R. 63).

Upon the conclusion of the petitioner's testimony, the hearing was adjourned. At a second hearing before the Commissioner on April 30, 1940 (R. 33), the depositions of the United States Attorney for the District of North Dakota (R.

19–22) and the Deputy Marshal (R. 22–24), taken pursuant to notice mailed January 24 (R. 25) were received in evidence (R. 34).

United States Attorney Lanier deposed that he first made the acquaintance of petitioner on October 13, 1936, when he was brought into the federal courtroom at Fargo, North Dakota, for arraignment (R. 20). He had no independent recollection of what he or the judge said to the petitioner when he was arraigned. But it was and is the invariable rule in his office for the United States Attorney or an assistant to advise a defendant, appearing without counsel, of the charges against him. He would then be advised by the court of his constitutional right. The court would advise him of his right to have an attorney, and if he had none, would ask him if he wanted an attorney. If he wanted an attorney, he would be asked if he had the money with which to pay him and if he said he did not have, the court would advise him that an attorney would be appointed for him and this would be done (R. 21). To his knowledge Judge Miller had never failed to advise a defendant of his constitutional rights and to ask if he desired counsel. He was certain that the petitioner was advised of the charges against him and morally sure that Judge Miller followed the usual practice in this case (R. 22).

Deputy Marshal Kennedy deposed (R. 22–24) that he transported the petitioner from the county

jail to court and back and, subsequently, to McNeil Island. Coming out of the courtroom, after sentence, petitioner said "Take me out and shoot me". On the way to McNeil Island, petitioner claimed that he had "made a deal with the F. B. I. men that he would plead guilty and take a twenty-five year sentence but that he did not figure that he was going to get two sentences, ten and fifteen years. Asked why he did not get an attorney to fight the case his answer was "something to the effect that he couldn't afford to go to Court, that if he did they would hang him". At no time during the course of the trip did he indicate that he desired an attorney (R. 24).

The Commissioner also received in evidence the statement signed by the petitioner that he was "implicated in the robbery" and his consent to removal from Kansas City (R. 36).

On May 23, 1940, the Commissioner filed his report (R. 26–32) in which, after summarizing the petitioner's testimony, the certificate of Judge Miller, the depositions of A. G. Kennedy and P. W. Lanier, and Kennedy's affidavit, he made the following findings of fact (R. 30):

> (1) Petitioner's criminal experience enabled him to understand and appreciate his rights;
>
> (2) Petitioner voluntarily entered a plea of guilty after thoroughly understanding the charges involved;
>
> (3) It was the uniform practice of the court in which sentence was imposed to in-

quire of those charged with felonies whether or not they wished counsel;

(4) The court in which sentence was imposed advised petitioner of his constitutional right to be represented by counsel;

(5) Petitioner voluntarily signed an admission of guilt;

(6) Petitioner competently and intelligently waived his right to the assistance of counsel.

The Commissioner concluded that the petitioner's attack upon the valadity of the sentence was premature because he had not served the sentence on the first count; and that "the experience petitioner achieved in criminal proceedings, his voluntary pleas of guilty to both counts; the uniform practice of the Court to advise those accused of felonies of their constitutional right to be represented by counsel—a practice which your Commissioner finds was followed in the instant matter, lead to the conclusion that petitioner competently and intelligently waived his right to the benefit of counsel" (R. 31–32). Accordingly, he recommended that the petitioner's application be denied.

On July 1, 1940, the District Court entered an order accepting the report of the Commissioner, denying the application for a writ of habeas corpus and discharging the writ (R. 66).[1] On August 1,

[1] On June 20, 1940, petitioner filed in the Circuit Court of Appeals for the Ninth Circuit a petition for a writ of mandamus, directing the District Court to rule on his applica-

1940, the petitioner filed in the District Court a motion for leave to appeal in forma pauperis (R. 66–67). The court reviewed the proceedings, certified that there was no merit in the application for appeal and denied the application (R. 68–69). On September 5 a similar petition was denied, without opinion, by the Circuit Court of Appeals for the Ninth Circuit (R. 73–75).

SUMMARY OF ARGUMENT

I

The application for a writ of habeas corpus was premature in so far as it attacked the successive sentences imposed upon the two counts of the indictment. Conceding that subsection (b) of U. S. C. Title 12, Sec. 588 b defines an aggravated form of the crime defined by subsection (a), and that the statute does not authorize sentences upon both subsections for the same robbery, it is equally true that the statute sanctioned either sentence and that neither has thus far been served. There is no occasion in this proceeding to determine which of the sentences is valid. Whichever is valid, the petitioner is not entitled to immediate release and the petition for a writ of habeas corpus is therefore premature. *McNally* v. *Hill*, 293 U. S. 131 definitively holds that habeas corpus is not the

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tion for a writ of habeas corpus (R. 69–72). Before the Circuit Court acted on this petition, the order of the District Court was entered.

remedy to fix the date of petitioner's eligibility for parole. If the issue were material at this stage, we should not hesitate to urge that the valid sentence is the longer one imposed upon the second count.

II

The second ground alleged in the application, that petitioner when he pleaded guilty did not know and was not informed of his right to have counsel assigned, is insufficient to attack the judgment under the Fifth and Sixth Amendments. The circumstances alleged establish neither a denial of the right to counsel nor the type of injury which we believe to be essential to render a judgment of conviction subject to collateral attack on habeas corpus.

Neither the Fifth nor the Sixth Amendment is violated by the failure of the trial court to assign counsel to represent a petitioner who pleads guilty, unless he requests the advice of counsel or is in need of counsel's aid. Neither *Johnson* v. *Zerbst*, 304 U. S. 458, nor *Walker* v. *Johnston*, No. 173, present Term, conflicts with this contention as to the scope of the constitutional guarantee. Both a request and a need for counsel were shown by the evidence in the *Zerbst* case and the pleadings in the *Walker* case, as they were construed by this Court. The broad statements in the opinion in the *Zerbst* case must be read in the light of the disposition of that case by this Court, which indi-

cates that the right is subject to qualifications which were not fully defined or, what is in substance the same thing, that a waiver may be found even though there is not an intentional relinquishment of a known right. In arguing that the Constitution does not require an offer to assign counsel to an indigent defendant in the absence of request or need, we accord to the Sixth Amendment at least as much scope as its history supports. Even less has been thought to suffice.

The distinction between a trial and a plea of guilty as evidence of need for counsel is the implicit basis of the many decisions since *Johnson* v. *Zerbst* which treat a voluntary plea of guilty, made, without requesting counsel, as a waiver of the right. A trial judges does not accept a plea of guilty without assuring himself that it is voluntary and competent and if it is not, we concede that it can be set aside (*Frame* v. *Hudspeth,* 309 U. S. 632).

The same conclusion follows from considerations as to the proper scope of the remedy of habeas corpus. To attack a judgment collaterally because of the denial of a constitutional right we contend that the petitioner must show that he was prejudiced by the act alleged to constitute the denial. To make such a showing he must establish that he suffered from the lack of counsel either in choosing his own course or in presenting his case. If the denial of counsel is ever truly jurisdictional,

we contend that it is only jurisdictional when it results in substantial injury. The recognized distinction between a trial which is unfair and one which is void indicates that the concept of jurisdictional defect is not impervious to differences of degree.

Petitioner's case is not significantly strengthened even if, as he contends, his testimony before the United States Commissioner should be treated as an elaboration of his petition and traverse. His assertion at the hearing that two Government agents threatened him with a long sentence, if he refused to consent to removal and to sign a statement acknowledging his guilt, does not make out a claim that he was deceived or coerced when he subsequently pleaded guilty. On his own statement, the discussion with the agents did not relate to the plea he should subsequently enter. Moreover at the time of the alleged statements petitioner was represented by counsel who had advised him to consent to removal. He was thus in a position to protect himself by obtaining the requisite legal advice at the time of the incident complained of.

III

Assuming that the rule to show cause developed material issues of fact, petitioner was deprived of no substantial right by the procedure employed to resolve them.

1. The action of the court in issuing a writ of habeas corpus returnable before a United States Commissioner was plainly equivalent to a reference of the issues developed on the rule to show cause, with direction to the Commissioner to take the testimony and report to the District Court with findings of fact and conclusions of law. The function and effect of the procedure was so conceived by the Commissioner, the court, the petitioner, and the petitioner's counsel. This mutual understanding is in keeping with the practice of the Federal courts for California for more than half a century.

2. A reference is permissible in habeas corpus proceedings. The only substantial question is whether it is incompatible with the statutory command that the court "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments". In view of the established practice of courts both at law and in equity, the practice of this Court, the broad definition of the power to appoint a master contained in Rule 53 of the Rules of Civil Procedure, we argue that a court none the less hears and determines because it refers the issue in the first instance to an inferior officer to take and report the testimony with his findings of fact.

If a reference is not incompatible with the hearing prescribed by the habeas corpus statute, we think it clear that the power to refer exists as an

aspect of the inherent power of Federal courts, broadly articulated in Rule 53 (a) of the Rules of Civil Procedure. The objection that the reference was forbidden by Rule 53 (b) because of the absence of exceptional circumstances plainly comes too late and would not have been valid if timely made.

3. The procedure did not otherwise deprive the petitioner of any substantial right.

(a) It was not improper to hold the hearing before the Commissioner in the Administration Building of the Penitentiary at Alcatraz.

(b) It was unnecessary for the court to make its own findings of fact since it adopted the findings of the Commissioner (Rule 52 (a), Rules of Civil Procedure).

(c) The finding that the petitioner was informed of his right to counsel is not invalid, even if, as petitioner contends, the Commissioner erroneously considered the certificate of the trial judge. In view of the deposition of the United States Attorney, the certificate was cumulative at the most. It is not clear that the court in approving the finding considered the certificate and, in view of the other evidence, there is no significant probability that its consideration affected the result. Moreover the finding that petitioner was informed of his right to counsel is unnecessary to support the judgment.

(d) The record does not support the argument that the procedure in the District Court operated

to deny the petitioner an opportunity to be heard on the approval of the Commissioner's report.

ARGUMENT

The petitioner asks that this Court exercise its power to determine the merits of the issues presented rather than the narrower question whether the Circuit Court of Appeals abused its discretion in denying the application to that court for leave to appeal *in forma pauperis.* (Cf. *In re 620 Church Street Corporation,* 299 U. S. 24, 27). We join in this request.[2] It is almost two years since the application for a writ of habeas corpus was filed in the District Court and the petitioner is still in custody. The issues involved have an importance to the administration of justice which would call for review on certiorari had they been determined by the Circuit Court of Appeals (cf. *Liberty Oil Co.* v. *Condon National Bank,* 260 U. S. 235, 245), perhaps even before judgment in that court, if the case were pending there. Moreover, the merits of the petitioner's contentions must be examined, in any event, to determine whether discretion was abused. We think that these considerations jus-

[2] We agree with the petitioner that the District Court's certification that "there is no merit in the application for appeal" is not to be read as a certificate that the appeal "is not taken in good faith" under the Act of June 25, 1910, c. 435, (36 Stat. 866), U. S. C., Title 28, Section 832; and that the District Court purported to exercise its own discretion to deny an appeal *in forma pauperis* without precluding an application to a higher court (See the Brief in Opposition in *Bell* v. *Johnston,* No. 438, present term).

tify a final determination of the merits at this stage (cf. *Bowen* v. *Johnston,* 306 U. S. 19).[3]

On the merits, we argue that the petition for a writ of habeas corpus and the traverse to the respondent's return state no case for the issuance of the writ; that if the pleadings on the rule to show cause developed a material issue of fact, it was not error to issue a writ returnable before a United States Commissioner, the function and effect of the procedure being to refer the issues to the Commissioner to hear the testimony and find the facts; that the procedure did not otherwise deprive the petitioner of substantial rights and that the writ was correctly discharged.

I

THE PETITION AND TRAVERSE STATED NO CASE FOR THE ISSUANCE OF THE WRIT OF HABEAS CORPUS

The petition for a writ of habeas corpus (R. 1–3) attacked the legality of the petitioner's detention on two grounds: (1) that the cumulative sentences imposed on the two counts of the indict-

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[3] If the narrower issue were alone to be determined, it would, however, be relevant that the substantial questions raised by the petitioner in this Court were certainly not set forth explicitly in the petitions for leave to appeal in forma pauperis addressed to the District Court (R. 66–67) and to the Circuit Court of Appeals (R. 73–74). The assignment that the "Court erred in not issuing a writ of habeas corpus" is hardly an informative statement of the point made here that what purported to be a writ was a legal nullity and that a reference is impossible in a habeas corpus proceeding.

ment constituted double jeopardy; and (2) that the judgment and sentence were in conflict with the Sixth Amendment because the right to counsel was denied. The traverse (R. 16–18) denies various allegations in the Warden's return to the rule to show cause but alleges no new facts and makes no additional contentions. We contend that the petition was premature on the first ground of attack; and that, on the second, the facts alleged are legally insufficient to entitle the petitioner to relief. If our contentions are valid, there was no occasion to issue a writ of habeas corpus (*Walker* v. *Johnston*, No. 173, present Term) and the application for a writ was properly dismissed.[4]

1. THE APPLICATION WAS PREMATURE INSOFAR AS IT ATTACKED THE SUCCESSIVE SENTENCES IMPOSED UPON THE TWO COUNTS OF THE INDICTMENT

Both counts of the indictment were based upon the Act of May 18, 1934, c. 304, Sec. 2 (48 Stat. 783),

[4] It is immaterial in this connection that the District Court issued a writ returnable before the United States Commissioner and dismissed the petition on the basis of the facts found rather than the sufficiency of the pleadings. The judgment was correct if the petitioner's allegations did not make out a *prima facie case*. See *United States* v. *Sing Tuck*, 194 U. S. 161, 170; *United States* v. *Ju Toy*, 198 U. S. 253, 261; *Ex parte Hull*, No. —, Original, decided March 3, 1941. We argue below (pp. 45–50) that the conclusion is the same if the petitioner's testimony before the United States Commissioner is to be regarded for this purpose as an elaboration of his written application (cf. *Whitten* v. *Tomlinson*, 160 U. S. 231, 242, 244).

U. S. C., Title 12, Sec. 588b. The first count, under subsection (a) of the statute charged robbery of an insured bank and the second count, under subsection (b) charged that lives were put in jeopardy in the course of the robbery, by the use of a dangerous weapon. Petitioner was sentenced to imprisonment for ten years on the first count and for fifteen years on the second, the latter sentence to commence at the expiration of the former (R. 9).

The petition for a writ of *habeas corpus* contends that the two counts alleged a single offence and that the cumulative sentences constituted double jeopardy. We think it clear that Congress could constitutionally punish putting lives in jeopardy in the course of a robbery as a separate crime, distinct from the robbery itself (*Albrecht* v. *United States,* 273 U. S. 1, 11; *Carter* v. *McClaughry,* 183 U. S. 365, 394–395). As a matter of statutory construction however, we agree that Congress did not intend to do so; that subsection (b) of the statute defines an aggravated form of the crime defined by subsection (a); and that the sentence of five to twenty-five years authorized by subsection (b) is an alternative rather than an addition to that of not more than twenty years authorized by subsection (a). *Durrett* v. *United States,* 107 F. (2d) 438 (C. C. A. 5th); *Hewitt* v. *United States,* 110 F. (2d) 1 (C. C. A. 8th); H. Rep. No. 1461, 73d Cong., 2d Sess., p. 2.

That the successive sentences were unauthorized does not, however, entitle the petitioner to relief on *habeas corpus*. If the statute did not sanction both sentences, it certainly sanctioned either and neither has thus far been served.[5] We see no occasion in this proceeding to determine whether, as petitioner contends, the valid sentence is that on the first rather than that on the second count. Whichever is valid, the petitioner is not entitled to immediate release and the petition for a writ of *habeas corpus* is premature. (*McNally* v. *Hill*, 293 U. S. 131; *De Bara* v. *United States*, 99 Fed. 942 (C. C. A. 6th); see also *United States* v. *Pridgeon*, 153 U. S. 48, 62–63). Petitioner argues that this Court should determine which sentence is invalid to fix the date of his eligibility for parole. *McNally* v. *Hill, supra*, definitively holds that for this purpose *habeas corpus* is not the remedy.

If the issue were material at this stage, we should not hesitate to urge that the valid sentence is the longer one imposed upon the second count (cf. *Hewitt* v. *United States, supra*). While that sentence was to commence at the expiration of the first, we see no reason why it should not be taken to have begun at the start, if the first was invalid. (cf. *Kite* v. *Commonwealth*, 11 Metcalf 581, 585 quoted in *Blitz* v. *United States*, 153 U. S. 308,

[5] The ten-year sentence, less the statutory good time allowance (U. S. C., Title 18, Sec. 710) would not expire until June 30, 1943.

318; *McNealy* v. *Johnston,* 100 F. (2d) 280 (C. C. A. 9th); *Ex parte Peters,* 19 Fed. Cas. 359 (W. D. Mo.). It is true that upon direct appeal from the judgment, the sentence would be amended to fix a definite date of beginning (*Fleisher* v. *United States,* 302 U. S. 218, 220, *Blitz* v. *United States, supra*). It does not follow that the amendment is necessary (cf. *DeBara* v. *United States, supra; McNealy* v. *Johnston, supra; Ex parte Peters, supra; United States* v. *Carpenter,* 151 Fed. 214 (C. C. A. 9th) or, even if it is, that the petitioner's remedy is habeas corpus rather than a motion to correct the sentence. The formal amendment can be made by the sentencing court at any time,[6] and if the amendment is refused, mandamus is available to compel it (*Garrison* v. *Reeves,* 116 F. (2d) 978 (C. C. A. 8th); see *McNally* v. *Hill, supra*). Moreover, even if the writ were to be sustained on this ground, it would be proper to delay the petitioner's discharge to permit the difficulty to be resolved by correction of the sentence (*Medley, Petitioner,* 134 U. S. 160, 174; *In re Bonner, Petitioner,* 151 U. S. 242, 261–262; *United States* v. *Carpenter,* 151 Fed. 214, 216 (C. C. A. 9th).

[6] See *In re Bonner, Petitioner,* 151 U. S. 242, 260; *Williams* v. *United States,* 168 U. S. 382, 389; *Bryant* v. *United States,* 214 Fed. 51, 53–54 (C. C. A. 8th); *Copeland* v. *Archer,* 50 F. (2d) 836, 838 (C. C. A. 9th); *DeBenque* v. *United States,* 85 F. (2d) 202, 207 (App. D. C.), certiorari denied, 298 U. S. 681; *Garrison* v. *Reeves,* 116 F. (2d) 978 (C. C. A. 8th).

2. THE APPLICATION WAS LEGALLY INSUFFICIENT TO ATTACK THE JUDGMENT UNDER THE FIFTH AND SIXTH AMENDMENTS

The application alleged no more than that petitioner, a man of mature age who had previously been convicted of a crime (R. 14A), pleaded guilty to both counts of the indictment, that he was not represented by counsel, that he did not know and was not told of his right to have counsel assigned, and that he could not, therefore, have made an intelligent or competent waiver of his constitutional right. It is not alleged that he desired or requested counsel, that he pleaded guilty under any misapprehension as to the nature of the charge or the implications of the plea, that he was induced to enter the plea by deception or coercion, that he is innocent of the crime charged, or that he would now interpose a defense. It is not even alleged that he was without funds to employ counsel at the time of his plea. The substance of the charge is only that he did not know and was not told of his right to have counsel assigned.

We contend that on these allegations, the application is legally insufficient to attack the validity of the judgment. In our view, the circumstances alleged establish neither a denial of the right to counsel guaranteed by the Sixth Amendment nor the type of injury which we believe to be essential to render a judgment of conviction subject to collateral attack on habeas corpus.

A. The Scope of the Right to Counsel

First: In *Walker* v. *Johnston,* No. 173, present Term, the Government contended that neither the Fifth nor the Sixth Amendment imposes upon trial courts the duty to assign counsel to a defendant charged with crime, unless he requests assistance or is in need of aid. This Court held that the application for habeas corpus stated a case sufficient to "overcome the presumption of regularity which the record of the trial imports". The decision rested upon the ground that

> "if the facts alleged were established by testimony to the satisfaction of the judge, they would support a conclusion that petitioner desired the aid of counsel and so informed the District Attorney, was ignorant of the right to such aid, was not interrogated as to his desire or informed of his right, and did not knowingly waive that right, and that, by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least to be advised by counsel as to his course."

The multiple bases of the decision indicate, we think, that the Court rejected our interpretation of the pleadings rather than our contention as to the general scope of the right. Similarly, in *Smith* v. *O'Grady,* No. 364, present Term, decided February 17, 1941, the petition alleged entrapment and

deception in inducing the petitioner to plead guilty as well as vain efforts on his part to obtain the assistance of counsel and to withdraw his guilty plea. These were the allegations which were held sufficient to attack the judgment of a state court under the Fourteenth Amendment. We think it clear, therefore, that the decisions at the present term do not establish the sufficiency of the present application. On the contrary, the emphasis placed upon the allegations of request for counsel and of deception or coercion[1] imply that when such allegations are absent as they are here, the petition is insufficient to state a case.

Second: None of the earlier decisions of this Court supports the contention that an assignment of counsel is required by the Constitution in the absence of request or need.

In *Johnson* v. *Zerbst,* 304 U. S. 458, upon which petitioners rely, there was an unresolved issue on the evidence as to whether the defendants had not expressly requested and been refused counsel. Moreover, the defendants pleaded not guilty, there was a trial in which they were not represented by counsel, they attempted unsuccessfully to obtain counsel after conviction and sentence and they lost their right to appeal because their papers were

[1] The opinions in *Walker* v. *Johnston, supra,* and *Smith* v. *O'Grady, supra,* indicate that deception or coercion is an independent ground for invalidating a judgment of conviction (cf. *Mooney* v. *Holohan,* 294 U. S. 103), though the absence of counsel is undoubtedly a related factor which aggravates the injury to the defendant.

not filed in time.[8] From the beginning of the case to the end the defendants denied their guilt; and when they appeared in court and expressed their determination to proceed, their need for counsel was as pressing and as clear as it could possibly have been. Even then this Court did not definitely hold that the right to counsel was denied. The decision below declining to intervene on habeas corpus was reversed but the case was remanded to determine whether the right had been waived. There was no evidence that the petitioners had been informed of their right to have counsel assigned, that they knew of their right or that any offer had been made to obtain counsel for their assistance. Implicit in the determination, therefore, is the view that the right is subject to qualifications which were not fully described or, what is in substance the same thing, that a waiver may be implied in law even though there was not an "intentional relinquishment or abandonment of a known right" (304 U. S. at 464).

It is true that in the *Johnson* case the opinion contains the broad statements that the "Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel" (304 U. S.

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[8] The evidence in the *Johnson* case is fully analyzed in the Government's brief in *Walker* v. *Johnston*, No. 173, present Term, pp. 25–28.

at 463); that "If the accused * * * is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty" (304 U. S. at 468); that the "constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel"; and, finally, that this "protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused" (304 U. S. at 465).

Taken literally, these statements undoubtedly would mean that the trial court is under a constitutional duty to offer to appoint counsel even though the accused makes no request for counsel and is not in need of aid. We think, however, that it is fair to suggest that they were written "under the pressure of" the particular situation (cf. *Snyder v. Massachusetts*, 291 U. S. 97, 114) and that they cannot be taken literally as the precise measure of the constitutional right. For if they are to be taken literally, it is difficult to understand why it is that this Court remanded the case to the District Court with directions to determine the issue of waiver rather than with directions to sustain the writ. This disposition of the case indicates, as we have said, that the right

is subject to qualifications which were not defined. We think the whole opinion makes clear that the decision rests upon the apparent and indisputable need for counsel when defendants, asserting their innocence, proceed without legal knowledge to try their own case, are convicted and forfeit their right to appeal.

Powell v. *Alabama,* 287 U. S. 45, upon which the petitioner also relies, certainly does not indicate that the Constitution requires the assignment of counsel in the absence of request or need. The tragic circumstances presented in that case need not be repeated in detail. It is enough to say that the defendants were charged with a capital crime; that they protested their innocence and were forced to immediate trial at a time when the degree of popular passion against them required reliance upon the military forces. This Court held, as one of the grounds of decision that "the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was * * * a denial of due process within the meaning of the Fourteenth Amendment" (287 U. S. at 71). The ultimate basis of the decision was that in "a case such as this, whatever may be the rule in other cases, the right to have counsel appointed, when necessary, is a logical corrollary from the constitutional right to be heard by counsel" (287 U. S. at 72) or, as this Court said in *Palko* v. *Connecticut,*

302 U. S. 319, 327, "that in the particular situation * * * the benefit of counsel was essential to the substance of a hearing." *Avery* v. *Alabama,* 308 U. S. 444, in which the judgment of the state court was affirmed, does not extend the principle or alter the basis upon which it rests.

We deny that the principle of these due process decisions may properly be applied to a defendant who makes no defense, does not seek to be heard and even now does not allege that he desires to make a defense; and that not even the Sixth Amendment requires an offer to appoint counsel where counsel was not requested and the need for counsel did not otherwise exist.

Third: In arguing that the Constitution does not require an offer to assign counsel to an indigent defendant, in the absence of request or need, we accord to the Sixth Amendment at least as much scope as its history supports.

Even less has been thought to suffice. After an extensive historical survey of the colonial practice and the early state constitutional provisions, this Court concluded in *Powell* v. *Alabama,* 287 U. S. 45, 68:

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired *and provided* by the party asserting the right. [Italics ours.]

See also *Cooke* v. *United States,* 267 U. S. 517, 537.

On at least one occasion this Court has explicitly said that there is "no general obligation on the part of the government either to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners (*United States* v. *Van Duzee*, 140 U. S. 169, 173). A similar view has been forcefully expressed by Judge Sibley, concurring in *Saylor* v. *Sanford*, 99 F. (2d) 605, 607 (C. C. A. 5th):

> The Constitution in saying that "the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence" means that if he provides himself counsel the court shall allow the counsel to assist and represent the accused—a right not accorded the accused in felony cases by the common law. It has never been understood that the federal courts were bound by the Constitution to furnish accused persons with counsel. * * * There are proposals pending before Congress to provide for a public defender, and for paying lawyers to defend indigent persons in some cases. All these arrangements for the defense of poor persons are acts of mercy, perhaps justice, but they are not required by the constitutional provision and have never been supposed to be.

See also *Sanford* v. *Robbins*, 115 F. (2d) 435 (C. C. A. 5th), No. 613, present Term, certiorari denied, March 10, 1941.

This conclusion finds support in the Act of April 30, 1790 (1 Stat. 112, 118, c. 9, Sec. 29; R. S.

Sec. 1034; U. S. C., Title 18, Sec. 563); enacted after the first ten amendments had been proposed by Congress (1 Stat. 97) which provided that in prosecutions for treason and other capital crimes the court before which the accused "is tried" is required "immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire." It is unlikely that the duty to assign would have been thus limited if the Sixth Amendment contemplated its existence in all cases.

The conclusion is also supported by the decisions of state courts, under constitutional provisions similar to the Sixth Amendment,[9] that the right to have counsel assigned is statutory rather than constitutional. See *e. g. People* v. *Williams,* 225 Mich. 133, 137–138; *Reed* v. *State,* 143 Miss. 686, 689; *State* v. *Sweeney,* 48 S. D. 248, 251; *Sowells* v. *State,* 99 Tex. Cr. App. 465, 468; *Pardee* v. *Salt Lake County,* 39 Utah 482, 488; *State* v. *Gomez,* 89 Vt. 490, 496. It is supported, finally, by the absence of persuasive affirmative evidence of a constitutional duty to assign.

If the bare historical record persuades that the Sixth Amendment contemplated the assignment of counsel, we think it clear that it does not persuade that assignment was contemplated without request. Even the English Treason Act of 1695,

[9] These provisions are set forth in the Government's brief in *Walker* v. *Johnston,* No. 178, Appendix A, pp. 50–52.

which was to some extent copied by the Act of April 30, 1790, *supra,* p. 36, called for a request; and, except in Pennsylvania, those state courts which have pointed to their constitutions as well as to inconclusive statutes[10] in finding a duty to assign, have explicitly required a request. See, *e. g. Weatherford* v. *State,* 76 Fla. 219; *Bethune* v. *State,* 26 Ala. App. 72, certiorari denied, 228 Ala. 422; *Holland* v. *Comm.,* 241 Ky. 813, 817; *State* v. *Satcher,* 124 La. 1015, 1019; *State* v. *Steelman,* 318 Mo. 628, 631–632; *State* v. *Raney,* 63 N. J. L. 363, 365; *Ex parte Rodriguez,* 118 Tex. Cr. App. 179, 181; *State* v. *Yoes,* 67 W. Va. 546, 547.

Most of the rights conferred by the Constitution must be claimed before they can be denied. The Court is not obliged to advise that the privilege against self-incrimination would justify a refusal to answer, even when the consequences of the answer are damaging indeed (see *Wilson* v. *United States,* 162 U. S. 613; *Powers* v. *United States,* 223 U. S. 303; *United States* v. *Block,* 88 F. (2d) 618 (C. C. A. 2d)) or that the accused has a right to a speedy trial (*Worthington* v. *United States,* 1 F. (2d) 154 (C. C. A. 7th); *Phillips* v. *United States,* 201 Fed. 259 (C. C. A. 8th)).

[10] In only a minority of the states do the statutes specifically provide that when a defendant appears for arraignment, he must be advised that it is his right to be assisted by counsel. American Law Institute, Code of Criminal Procedure, Official Draft (1930) 630.

We think that the framers did not doubt that if men were granted rights by the organic law they would have the wit and the fortitude to assert them. The thought that more may sometimes be needed to bring potential rights to the fruition of enjoyment, while the basis of much modern legislation, is not a product of the Eighteenth Century.

Fourth: In our view the decisions of this Court go beyond the historical record and imply that the Sixth Amendment imposes a duty to assign counsel. But we do not think that it imposes such a duty in the absence of a request or of other circumstances which serve the function of a request in pointing to an actual need. Such circumstances may well be thought to exist in any case in which the defendant asserts his innocence and is required to stand trial without the assistance of counsel. But they do not exist where, as in the case at bar, the defendant, upon arraignment, pleads guilty to charges of which he is fully informed and is sentenced by a court which, presumably, was satisfied that his plea was voluntarily made.

The distinction between a trial and a plea of guilty as evidence of the need for counsel is the implicit basis of the many decisions since *Johnson* v. *Zerbst* which treat a voluntary plea of guilty, made without requesting counsel, as a waiver of the right (See, *e. g., Cundiff* v. *Nicholson,* 107 F. (2d) 162 (C. C. A. 4th); *Cooke* v. *Swope,* 28 F. Supp. 492

(W. D. Wash.), affirmed, 109 F. (2d) 955 (C. C. A. 9th); *Williams* v. *Sanford,* 110 F. (2d) 526 (C. C. A. 5th), certiorari denied, 310 U. S. 643).[11] We think the conclusion of these decisions is sound, though we prefer to state the result as a qualification of the right rather than its legal equivalent—the implication of a waiver as a matter of law. The distinction has also been supported by emphasizing that it is "for his defence" that the Constitution guarantees the right to counsel; and a defendant who pleads guilty desires to make no defense. See *Cooke* v. *Swope,* 28 F. Supp. 492, *supra; Parker* v. *Johnson,* 29 F. Supp. 829, 830 (N. D. Cal.); *State* v. *Murphy,* 87 N. J. L. 515, 530; *State* v. *Heyer,* 89 N. J. L. 187. In Pennsylvania, the decisions requiring the accused to be advised of his right to counsel—in spite of the absence of a statute so providing (*Commonwealth* v. *Cohen,* 123 Pa. Super. 5; *Commonwealth* v. *Valerio,* 118 Pa. Super. 34)—have recently been held inapplicable to a defendant who pleads guilty. *Commonwealth ex rel. Curtis* v. *Ashe,* 139 Pa. Super. 417; *Commonwealth ex rel. Campbell* v. *Ashe,* 15 Atl. (2d) 409. The

[11] Accord: *Harpin* v. *Johnston,* 109 F. (2d) 434 (C. C. A. 9th), certiorari denied, 310 U. S. 624; *Franzeen* v. *Johnston,* 111 F. (2d) 817, 820 (C. C. A. 9th); *Buckner* v. *Hudspeth,* 105 F. (2d) 396, 397 (C. C. A. 10th), certiorari denied, 308 U. S. 553; *McCoy* v. *Hudspeth,* 106 F. (2d) 810, 811 (C. C. A. 10th); *Wilson* v. *Hudspeth,* 106 F. (2d) 812, 813 (C. C. A. 10th); *Pers* v. *Hudspeth,* 110 F. (2d) 812, 813 (C. C. A. 10th; *Blood* v. *Hudspeth,* 113 F. (2d) 470, 471 (C. C. A. 10th); *Erwin* v. *Sanford,* 27 F. Supp. 892 (D. C. Ga.).

same distinction has been taken in other states in the application of the assignment statutes. See, *e. g., State* v. *Murphy, supra; State v. Heyer, supra; People* v. *Williams,* 225 Mich. 133. A trial judge does not accept a plea of guilty without assuring himself that it is voluntary and competent (*Kercheval* v. *United States,* 274 U. S. 220); and if the plea is involuntary or incompetent the Government conceded (*Frame* v. *Hudspeth,* 309 U. S. 632) that it can be set aside. See also *Sanders* v. *Allen,* 100 F. (2d) 717 (App. D. C.).

It is not alleged in the present case that the petitioner pleaded guilty without full understanding of the nature of the charge and the implications of the plea; and recitations in the minutes of sentence that he remained silent when asked if there was any cause why sentence should not be pronounced (R. 8) [12] carry assurance that the plea which the petition does not impeach was competently and voluntarily made.

B. The Remedy of Habeas Corpus

First: Even if the Sixth Amendment is interpreted, as petitioner contends, to require that all defendants have counsel upon arraignment or knowingly waive the right, we do not think it necessarily follows that whenever this has not occurred the judgment is void and is open to collateral attack.

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[12] Cf. *Rex* v. *Richmond,* 39 D. L. R. 117, (1918); Stephen, *History of the Criminal Law of England,* I, 442.

The right to counsel is guaranteed because it meets a need, not for its own sake. Accordingly, we contend that it is not enough to show that the abstract right was denied; it must also be shown that the need existed which constitutes the justification of the right. Even upon direct appeal a challenge based upon denial of the constitutional right is not ordinarily tenable unless the appellant was prejudiced by the acts alleged to constitute the denial (see *e. g. Motes* v. *United States,* 178 U. S. 458, 474; *Snyder* v. *Massachusetts,* 291 U. S. 97, 122; *Louisville & Nashville R. R. Co.* v. *Finn,* 235 U. S. 601, 610). When the attack is collateral there is obviously stronger reason for requiring the showing to be made.

To make such a showing a petitioner must establish that he suffered from the lack of counsel either in choosing his own course or in presenting his case. Such prejudice may be readily presumed when, as in *Johnson* v. *Zerbst, supra,* a defendant without legal competence is forced to trial without aid.[13] It may also be readily inferred when a re-

[13] It may be added that the record in the *Johnson* case showed that the defendants were troubled by testimony at the trial that the money they were charged with passing was counterfeit, because they did not believe "an ordinary person not used to handling money any more than I was could tell it was counterfeit" (R. 47). The matter was settled by the United States Attorney choosing an expert witness unknown to the defendants who testified that the money was counterfeit (R. 46–47).

quest for counsel was denied, since a defendant who seeks the aid must usually have responded to a felt need. But it cannot be implied when a defendant understandingly pleads guilty to an indictment validly charging a serious offense, and certainly not when he is a man of mature age who has previously been convicted of crime. In such a case a conviction has not resulted from the defendant's "own ignorance of his legal and constitutional rights" (*Johnson* v. *Zerbst,* 304 U. S. at 465). Counsel "had they been assigned could have entered no other plea than that which he himself entered, if they had dealt honestly with him and with the court" (Parker, J. in *Cundiff* v. *Nicholson,* 107 F. (2d) 162, 164 (C. C. A. 5th)). It is true that the sentence was excessive insofar as sentence was imposed upon both counts of the indictment. But from that error the petitioner has not suffered and will not suffer since the sentence can be corrected on motion and, if it is not, habeas corpus will be available to him in due time (see pp. 24–27, *supra*). So far as the judgment as a whole is concerned the only significant complaint is that originally alleged in the petition—that petitioner did not know and was not told of his right to counsel. In our view this is wholly insufficient to render the judgment vulnerable on collateral attack. It might even be held insufficient on direct attack (see Rule II, 4 of the Criminal Appeals Rules; Cf. *United States* v. *Norris,* 281 U. S. 619).

Second: It may be objected that this Court said in *Johnson* v. *Zerbst, supra,* that denial of the constitutional right to counsel is a jurisdictional defect; and that regardless of questions of prejudice the judgment was void and habeas corpus is an available remedy. We do not think that the defect, if defect there was, is truly jurisdictional. If it were, the doctrine of *Johnson* v. *Zerbst* would lead to denying that those acquitted without counsel have "been validly acquitted and cannot be tried again" (Sibley, J., in *Sanford* v. *Robbins,* 115 F. (2d) 435 (C. C. A. 5th), No. 613, present Term, certiorari denied, March 10, 1941).

We submit that the proper analysis is that habeas corpus may be employed to remedy the injustice caused by the denial of a fundamental right when there is no other remedy to which the aggrieved party may fairly be held (Cf. *Mooney* v. *Holohan,* 294 U. S. 103; see also *Bowen* v. *Johnston,* 306 U. S. 19). To call the defect jurisdictional preserves the integrity of the ancient rule that habeas corpus tests only the jurisdiction. (Cf. *Harlan* v. *McGourin,* 218 U. S. 442; *Knewel* v. *Egan,* 268 U. S. 442.) But it involves substantive difficulties in the present situation which more than outweigh the advantages thus obtained. Moreover, even if the error must be regarded as jurisdictional for habeas corpus to be available, we contend that it is only jurisdictional when it results in substantial injury to the petitioner. It is not to be for-

gotten that the decision in *Johnson* v. *Zerbst* found its primary authority in cases involving a trial which is only a sham (*Moore* v. *Dempsey*, 261 U. S. 86; cf. *Frank* v. *Mangum*, 237 U. S. 309; *Mooney* v. *Holohan*, 294 U. S. 103). The recognized distinction between a trial which is unfair and one which is void [14] indicates that the concept of jurisdictional defect is not impervious to differences of degree.

Third: That such consideration should have weight in determining the extent to which judgments of conviction should be subject to collateral attack is strikingly emphasized by the fact that in 1938 and 1939 more than 70,000 pleas of guilty were filed in federal courts and 38,000 for the year ending June 30, 1940. In 1938 more than 50,000 pleas of guilty were filed in the courts of 26 states,[15] in many of which the defendants were not required under state law to be informed of the right to counsel. The Government agrees that the desirable practice is that provided by the statutes of some states requiring an offer to appoint counsel upon

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[14] Compare the memorandum of Mr. Justice Holmes denying application for habeas corpus in *Sacco and Vanzetti* v. *Massachusetts*, printed in *The Sacco-Vanzetti Case* (1929), V, pp. 5516–5517. See also L. Hand, J., dissenting, in *Craig* v. *Hecht*, 282 Fed. 138, 155 (C. C. A. 2d).

[15] This data was made available to the Department by Dr. C. C. Van Vechter, Chief of the Census Bureau, Department of Commerce. The number of pleas in the federal courts for the fiscal year ending June 1940 is taken from Annual Report of the Director of the Administrative Office of the United States Courts (1940), p. 85.

arraignment, even on a plea of guilty.[16] In March 1937 the Attorney General urged that counsel be appointed "in each case in which the defendant has not retained counsel, unless he expressly states that he wishes to conduct his own defense" (Circular No. 2946); and for several years legislation has been furthered to establish a system of public defenders.[17] Such reforms can be achieved legislatively without the retroactivity of constitutional adjudication. If retroactivity is essential, the reforms will be achieved at a cost which may offset the gain.

3. THE PETITIONER'S TESTIMONY BEFORE THE UNITED STATES COMMISSIONER DID NOT STATE A PRIMA FACIE CASE

Petitioner argues (Brief p. 34) that in determining the sufficiency of his application for a writ of habeas corpus to require the issuance of the writ, his testimony before the United States Commissioner should be treated as an elaboration of his petition and traverse. Even if his testimony is thus treated as a set of supplementary allegations, we contend that it does not significantly strengthen the case.

First: The portion of his testimony upon which petitioner mainly relies is that relating to the statements which he claimed were made to him by two agents of the Federal Bureau of Investiga-

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[16] See, *e. g.*, Minn. Gen. Stat. (1923) § 10667. But cf. *State* v. *McDonnell*, 165 Minn. 423, 426.

[17] See Annual Report of the Attorney General (1940), pp. 7–8.

tion before his removal to North Dakota and while he was detained with other federal prisoners in Kansas City. It is urged (Brief, pp. 32, 42) that in this testimony petitioner averred that he was induced to plead guilty by false and coercive statements that he would be sentenced to eighty years in prison, if he did not, and to only ten years if he did. In our view, this is a gross distortion of the testimony. Petitioner did say that the agents had threatened him with eighty years and promised to help him get only ten. But on two (R. 38, 64) of the three occasions (see also R. 61) when he made this claim, he said that the condition of the threat was not his refusal to plead guilty but rather his refusal to consent to removal and to sign a statement acknowledging that he was "implicated" in the robbery charged. The conflict was called to his attention and the point made explicit at the close of his testimony when he was asked if the agents discussed his plea with him. He replied: "The discussion was about the statement I should sign for them" (R. 64). At no point did he testify that he was led to plead guilty because he had signed the statement, when his "real desire was to plead not guilty or at least to be advised by counsel as to his course" (*Walker* v. *Johnston*, No. 173, p. 7); the purpose of his testimony seems clearly to have been to *avoid* any inference from his statement (which was introduced in evidence) that he had expressly waived counsel,

rather than to adduce the threat and the promise as an independent ground for relief not advanced in the petition itself.

It is significant in this connection that the petitioner's testimony as a whole discloses him to be a man of intelligence, ready of expression and response, who had been arrested frequently in the past and had previously been convicted of a crime, after a trial in which he was represented by counsel. These additional circumstances warrant, at the least, a close reading of his testimony in determining whether it suffices to allege that he "was deceived or coerced by the prosecutor into entering a guilty plea" (*Walker* v. *Johnston, supra*).

Of even greater importance, however, than the proper interpretation of this testimony, is the fact that at the time of the alleged statements petitioner was represented by counsel, who had advised him to consent to removal. Both he and his counsel were acquainted with the charges in the indictment. It is true that he testified that he did not discuss the statements with his attorney or consult with him as to the plea which he should enter upon his arrival in North Dakota. We may assume that these claims, fantastic as they are upon their face, are to be treated as allegations which the petitioner is entitled to prove if he can. It nevertheless appears from his own testimony that he was then in a position to protect himself by obtaining the requisite legal advice, if he chose

to do so. We submit that this was enough to draw the sting from the asserted statements of the agents, even if those statements would otherwise be held to vitiate his guilty plea (cf. *Garrison* v. *Johnston,* 104 F. (2d) 128 (C. C. A. 9th), certiorari denied, 308 U. S. 553, 636; *Thompson* v. *King,* 107 F. (2d) 307 (C. C. A. 8th). The issue may be tested by supposing that he had been represented by counsel at the time of his plea and that similarly deceptive or coercive statements had been made to him at that time. We doubt that the claim that two police officers had made such statements—but that he had not seen fit to disclose them to his counsel—would be held to entitle him to a writ of habeas corpus. Yet the case supposed would be stronger for relief than the case at bar.

In *Walker* v. *Johnston,* upon which the petitioner strongly relies, the alleged threat was by the prosecutor, it was made with particular reference to the prisoner's plea and the prisoner was not represented by counsel either at the time of the alleged threat or at any other time.

To avoid the force of petitioner's representation by counsel prior to his removal to North Dakota, he points to *Johnson* v. *Zerbst,* and the fact that the petitioners there had counsel upon the arraignment, though not upon the trial. The answer is wholly clear. In the *Johnson* case the defendants needed counsel to meet the new problems presented by a trial in which they sought to maintain

their innocence. It was of no assistance to them then that they had been represented by counsel at the earlier stage. In the present case, the crucial incident urged to support the petition—the alleged threat—occurred before the removal; and the petitioner was represented by counsel at that time.

The petitioner's failure to note this distinction reveals the weakness of an argument which stresses the presence or absence of isolated elements in the cases heretofore decided by this Court, rather than a rational principle which explains the significance which those elements may have. We submit that the principle is that a defendant who was not represented by counsel can challenge the judgment only if he can show that he requested counsel or that he was in need of aid; nothing appears in the present case—either in the papers or in the testimony—to indicate that either condition is met.

Second: Petitioner also points to his testimony (R. 51) that after he had pleaded guilty to the first count, the second count was read, he hesitated and the trial court "instructed that any one who was guilty of any part of it was guilty of all." It is argued (Brief p. 39) that this alleged statement by the court constituted erroneous legal advice, misleading petitioner into pleading guilty to both counts in the indictment. In reply we say again that petitioner has not suffered from the

double sentence and has an adequate remedy at hand. We see no force in the argument that the entire judgment should be held void because a part of it conflicts with what has since been accepted as the governing law.[18] Moreover, both petitioner and his Kansas City attorney were informed of the contents of the indictment. That his attorney did not call the matter to his attention suggests, what is the fact, that at that time the statute was widely misread. We think it clear that this incident too is utterly insufficient to state a case of oppression.

II

ASSUMING THAT THE RULE TO SHOW CAUSE DEVELOPED MATERIAL ISSUES OF FACT, PETITIONER WAS DEPRIVED OF NO SUBSTANTIAL RIGHT BY THE PROCEDURE EMPLOYED TO RESOLVE THEM

After the petition, the return and the traverse had been filed, the District Court issued what purported to be a writ of habeas corpus returnable "before the United States Commissioner for the Northern District of California, Southern Division, at the Administration Building of the United States Penitentiary at Alcatraz" (R. 18). Peti-

[18] At the time of the sentence, on October 13, 1936, neither *Durrett* v. *United States*, 107 F. (2d) 438 (C. C. A. 5th), nor *Hewitt* v. *United States*, 110 F. (2d) 1 (C. C. A. 8th), *supra*, p. 25, had been decided. The first reported decision under the statute (*United States* v. *Harris*, 26 F. Supp. 788 (S. D. Calif.), sustained the validity of a double sentence.

tioner contends that this was not the traditional writ of habeas corpus to which he was entitled if his application stated a *prima facie* case; and that his rights were substantially infringed by not issuing a writ, in the usual form, returnable before a judge or the court. We submit that the contention is unsound.

1. THE PROCEDURE FOLLOWED BY THE DISTRICT COURT WAS EQUIVALENT TO A REFERENCE TO THE COMMISSIONER TO HEAR AND REPORT THE TESTIMONY, WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW.

We do not argue that a United States Commissioner is a "judge" of a District Court, authorized by the statute to issue or to dismiss writs of habeas corpus (Rev. Stat. Sec. 752, U. S. C., Title 28, Sec. 452). We do contend that in spite of the language of the writ returnable before the Commissioner commanding the respondent "then and there to do, submit and receive whatsoever the United States Commissioner shall then and there consider in that behalf" the function and effect of the procedure was to refer the issues developed on the rule to show cause to the Commissioner with direction to take and report the testimony to the District Court, with his findings of fact and conclusions of law. We argue further that this procedure deprived the petitioner of no substantial right and was within the power of the District Court.

First: That the Commissioner conceived the procedure as equivalent to a reference to find the

facts and report to the court is apparent not only from his report (R. 26) but also from his statement at the opening of the hearing that the "District Court referred [the issues] to me to take testimony" (R. 37). His conception was shared by the petitioner who replied to the Commissioner's opening statement: "I understand" (R. 37) and, seemingly, by the petitioner's counsel who made no objection and participated in the hearing throughout. The same view of the matter was obviously taken by the court which, after a hearing, approved the report (R. 66) and adopted its findings (R. 69), though not without examining the evidence and making an independent determination (R. 69).[19]

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[19] The order denying the application and discharging the writ (R. 66) recites that the "report of the United States Commissioner came on regularly this day to be heard," that there was no appearance for the petitioner and that it is ordered that "said Report of the Commissioners be and the same is hereby approved." The opinion subsequently rendered in denying leave to appeal *in forma pauperis* contains the following fuller statement (R. 68–69): "A full hearing was held at Alcatraz Penitentiary, and the report, findings and recommendation of the Commissioner are on file herein. After an examination of the transcript of the proceedings had at this hearing, the testimony of the petitioner, the evidence presented by the respondent and the record filed as a part of the return, this court determined that petitioner had failed to sustain the burden imposed on him of proving that he was deprived of his constitutional right to the assistance of counsel for his defense and that the evidence amply supported the finding of the Commissioner that the petitioner competently and intelligently waived his right to the assis-

Second: This mutual understanding of the nature of the procedure is in keeping with the historic practice of the federal courts for California. The reference of issues of fact arising in habeas corpus proceedings to a United States Commissioner to hear the evidence and report findings originated long ago as a response to the tremendous number of petitions filed in Chinese exclusion cases. The earliest record of it, so far as we know, is a minute order signed by Circuit Judge Sawyer, dated July 9, 1888, referring all cases in which a writ of habeas corpus is issued "by or on behalf of a Chinese passenger seeking to land from any vessel in a port of this District" to "S. C. Houghton, Esquire, a Commissioner of this Court, to hear the testimony, ascertain and determine and report to the Court the facts and conclusions of law, and such judgment, as in his opinion ought to be rendered in each case" and, in case of exception by either side to the findings and judgment, to "report for the consideration of the Court all the testimony in the case upon which his findings are based."[20] Decisions of the period refer to such references as "the established practice" of the District Court (see e. g. *Gee Fook Sing* v.

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tance of counsel; and adopting and approving the report, findings and recommendation of said United States Commissioner, the writ was discharged."

[20] A copy of this order, certified by a Deputy Clerk of the District Court for the Northern District of California has been filed with the Clerk of this Court.

United States, 49 Fed. 146, 147 (C. C. A. 9th); *Lee Sing Far* v. *United States*, 94 Fed. 834 (C. C. A. 9th); *In re Jew Wong Loy*, 91 Fed. 240 (N. D. Calif.). We are not aware that it was ever questioned, though it was followed in at least two cases which reached this Court (cf. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 652, 656; *United States* v. *Ju Toy*, 198 U. S. 253, 264; see also *Tang Tun* v. *Edsell*, No. 45, October Term, 1911, Record p. 16).

In view of the standing order of reference it was obviously simpler to make the writ returnable before the Commissioner and this, we are advised, was done at that time. A rule of practice of the Circuit Court for the District of California, adopted September 7, 1904 (Rule 99) implicitly recognized this practice in the following provision:

> When a writ of habeas corpus is issued in behalf of any person claiming the right to enter or land in the United States as a citizen thereof, the writ shall, unless otherwise ordered by the Court, direct that the custody of such person shall not be disturbed pending the determination of the proceedings under the writ, but the person having such alleged citizen in custody shall when required so to do, bring him before the Court or Commissioner for the purpose of giving evidence, or in order that he may be present during the actual trial of the issues arising upon the petition for the writ and the return thereto, and when his presence is

no longer required before the Court or Commissioner, he shall be immediately returned to the custody of the person so producing him.

The rule remained as Rule 100 of the Rules adopted October 22, 1907. In 1926, it became Rule 133 of the Rules of the United States District Court for the Northern District of California but was broadened in scope to apply to all cases when "a writ of habeas corpus is issued in behalf of any person in the custody of any officer of the United States or of this State." In this broader form it is now included in Rule 50 of the Rules of Practice adopted December 1, 1933 (Appendix, *infra*, p. 76).

It is apparent, therefore, that the federal courts in California have referred issues of fact to Commissioners in habeas corpus cases for more than fifty years and that the issuance of a writ returnable before a Commissioner is a traditional equivalent of such an order of reference.[21] (Cf. *Grin* v. *Shine*, 187 U. S. 181.) The fairness of the equivalent can hardly be doubted in the present case where the writ was issued only after the issues had been fully developed on the rule to show cause,

[21] That references may be made to Commissioners is clearly contemplated by the statute prescribing their compensation (Act of May 28, 1896, c. 252, 29 Stat. 184, U. S. C. Title 28, Sec. 597) which provides a fee of $3 a day for attending to a reference in a litigated matter in a civil cause at law, in equity or in admiralty, in pursuance of an order of the Court.

indicating that the petitioner was not entitled to prevail without first establishing the facts.

2. A REFERENCE IS PERMISSIBLE IN HABEAS CORPUS PROCEEDINGS

First: Petitioner argues that the practice conflicts with three provisions of the habeas corpus statutes: (a) that the "person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention" (Rev. Stat. Sec. 757, U. S. C. Title 28, Sec. 457); (b) that "the person making the return shall at the same time bring the body of the party before the judge who granted the writ" (Rev. Stat. Sec. 758, U. S. C. Title 28, Sec. 458); and (c) that the "court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require" (Rev. Stat. Sec. 761, U. S. C. Title 28, Sec. 461).

(a) The first contention overlooks the fact that prior to the issuance of the writ returnable before the Commissioner, the respondent had made a return to the District Court in the form of an answer to the order to show cause. The answer contained everything which would have been included in the return had the writ issued upon the filing of the petition itself. To require a second return upon the issuance of the writ would involve a useless duplication and conflict with the basic assumptions

upon which the order to show cause procedure rests. On this issue, therefore, we think the decision in *Walker* v. *Johnston* affords the decisive reply.

(b) The same answer may be made to the second point, that the person making the return did not bring the body of the petitioner before the issuing judge. One of the purposes of the rule to show cause is to avoid "useless grant of the writ with consequent production of the prisoner" (*Walker* v. *Johnston, supra,* p. 5). The issues, as defined on the rule to show cause, clearly indicated that the petitioner was not entitled to be released on the face of the return. Accordingly, his physical production in court could have served no purpose other than to accord him the opportunity to testify before the issuing judge in support of the petition.[22] Hence, the only real question is whether the habeas corpus statutes accord to a petitioner the right to have the evidence heard in the first instance by the

[22] The traditional requirement that the prisoner be produced at the time of the return developed at a time when the return imported absolute verity and its sufficiency could be challenged only on its face. If the return was insufficient, the prisoner was entitled to be bailed or to be released; and his presence in court assured that the relief would be afforded at once (see Institutes, i, 55; Commentaries, iii,* 129 *et seq.*; Holdsworth, *History of English Law*, IX, 119–121). The reason for the requirement is obviously inapplicable when the proceedings on the rule to show cause have indicated that the petitioner is not entitled to his immediate discharge.

judge or court rather than by a master or referee.[23] If they do, we concede that "issues of fact emerging from the pleadings" on the rule to show cause must be "tried as required by the statute" (*Walker* v. *Johnston, supra,* p. 5). That, indeed, is the only qualification which the decision in the *Walker* case imposed on the use of the rule to show cause. If that requirement is met, the petitioner is amply protected by his production in court for discharge, if the writ is sustained.

(c) We do not think that the statutory command that the court "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments" precludes a reference by the court to a master to hear and report the testimony with his findings of fact and conclusions of the law—so long as the actual adjudication is made by the Court.

The question is whether the words "by hearing the testimony" must be construed in the literal sense or whether the testimony may be heard through the instrumentality of a master, with ultimate adjudication by the court upon an examination of the transcript and the findings con-

[23] This is the view reflected in Rule 50 of the Rules of Practice, Northern District of California (Appendix, *infra,* p. 76) which provides that "the person having such person in custody shall when required so to do, bring him before the Court or Commissioner for the purpose of giving evidence, or in order that he may be present during the actual trial of the issues arising upon the petition for the writ and return thereto. * * *"

tained in the master's report. We think the language must be read with the tacit assumptions of the law as to what a "hearing" traditionally imports. The power and practice of equity courts to refer issues to a master with or without consent,[24] the power of courts of law to appoint auditors and to accord to their reports the maximum scope permitted by the Seventh Amendment (*Ex parte Peterson*, 253 U. S. 300; see also *Heckers* v. *Fowler*, 2 Wall. 123), the practice of this Court in cases within its original jurisdiction,[25] the broad definition in Rule 53 of the Rules of Civil Procedure of the power to appoint a master in actions formerly legal as well as equitable—all combine to refute the contention that a court does not hear and determine because it refers the issue to an inferior officer to take and

[24] See *Kimberly* v. *Arms*, 129 U. S. 512, 525; *Crawford* v. *Neal*, 144 U. S. 585, 596; *Davis* v. *Schwartz*, 155 U. S. 631, 637; *Ex parte Peterson*, 253 U. S. 300, 312–313; Equity Rule 74 (1912); Rule 59 (1928); *cf.* Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals*, 42 Harv. L. Rev. 483, 486–488. The power has been exercised in cases tried by a three-judge court under Judicial Code Sec. 266, in spite of the command of the statute that the application shall be "heard and determined by three judges" (*Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 308).

[25] See e. g. *Texas* v. *Florida*, 306 U. S. 398; *New Jersey* v. *Delaware*, 291 U. S. 361. In *United States* v. *Shipp*, 214 U. S. 386, a proceeding to punish for contempt, this Court appointed a commissioner to take the testimony and report, without findings or conclusions of law. Upon the basis of the testimony reported, adjudications of contempt were made.

report the testimony, with findings of fact and conclusions of law.

The equity practice is peculiarly persuasive in the present context because in England—at least since the Habeas Corpus Act (31 Car. II, c. 2)—the writ of habeas corpus issued out of chancery as well as the law courts (cf. *People ex rel. Woodbury* v. *Hendrick,* 215 N. Y. 339, 346). The analogy of equity has been observed by this Court, which has said, referring to the summary inquiry authorized by the statute: "All the freedom of equity procedure is thus prescribed; and substantial justice, promptly administered, is ever the rule in *habeas corpus*" (*Storti* v. *Massachusetts,* 183 U. S. 138, 143; see also *Ex parte Royall,* 117 U. S. 241, 251). Indeed, if a reference were impossible under the statute, it is difficult to see how this Court could ever practically exercise its power to issue an original writ of habeas corpus if issues of fact were involved. The mandate of the statute "is applicable to this Court whether it is exercising its original or appellate jurisdiction" (*Storti* v. *Massachusetts, supra*).

The compatibility of a reference with the habeas corpus statutes is also sustained by the long-standing federal practice in California, referred to above,[26] which has been followed to some extent in

[26] In addition to the authorities cited, *supra*, pp. 53–54, see *In re Can Pon*, 168 Fed. 479 (C. C. A. 9th); *In re Tsu Tse Mee*, 81 Fed. 702 (N. D. Calif.).

other federal courts.[27] There is at least one English precedent, and prior to the federal statute, for ordering a reference (*The Case of the Hottentot Venus,* 13 East 194); the practice of taking the verdict of a jury appears to be more common. (*In the Matter of Andrews,* 8 Q. B. 153, 160; *Re Guerin,* 60 L. T. 538, 542n.; *Re Gibson,* 15 Ont. L. R. 245, 247; see *In re Hakewill,* 12 C. B. 223, 228.) Both practices have been followed in the State courts, especially, though not exclusively, in infant custody cases.[28] Neither has been regarded as detracting from a judicial inquiry into the facts or the function of a habeas corpus hearing.

Nor is it decisive against a reference on habeas corpus, as petitioner argues, that personal liberty is involved. We do not deny that it is preferable when issues of credibility are presented to have

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[27] See *Ex parte Sharp*, 33 F. Supp. 464 (D. Kan.); *United States ex rel. Ng Wing* v. *Brough*, 15 F. (2d) 377, 378 (C. C. A. 2d); *United States* v. *Corsi*, 55 F. (2d) 360 (S. D. N. Y.), aff'd 64 F. (2d) 1022 (C. C. A. 2d); *United States* v. *Dunton*, 288 Fed. 959 (S. D. N. Y.); *United States ex rel. Fong On* v. *Day*, 39 F. (2d) 202 (S. D. N. Y.), reversed on other grounds, 54 F. (2d) 990 (C. C. A. 2d). Cf. *King* v. *M'Lean Asylum of Massachusetts General Hospital*, 64 Fed. 331 (C. C. A. 1st).

[28] See *Ex parte Mooney*, 10 Cal. (2d) 1, 15; *Respublica* v. *Gaoler*, 2 *Yeates* (Pa.) 258; *Graham* v. *Graham*, 1 Serg. & R. 330; *People ex rel. Woodbury* v. *Hendrick*, 215 N. Y. 339; *People ex rel. Keator* v. *Moss*, 6 App. Div. 414, 419; *Matter of Mather*, 140 App. Div. 478; *Matter of Meyer*, 146 App. Div. 626; *People ex rel. Jones* v. *Johnson*, 205 App. Div. 190; *Joseph* v. *Puryer*, 273 S. W. 974 (Tex.); *Cooke* v. *Cooke*, 67 Utah 371; *Ex Parte Cannon*, 75 S. C. 214; *Ex parte Eagan*, 18 Fla. 194, 201. Contra: *State* v. *Farlee*, 1 N. J. L. 41.

the petitioner heard by the court. But it is another thing to hold that the statute requires this result by an unconditional command. The use of a master or commissioner is not precluded in other proceedings which may terminate in punishment, notably in the case of contempt (cf. *United States* v. *Shipp*, 214 U. S. 386). It is enough that the responsibility of ultimate adjudication is the court's (Cf. *Chin Bak Kan* v. *United States*, 186 U. S. 193, 200; *Ng Fung Ho* v. *White*, 259 U. S. 276, 279). Moreover, the argument assumes that a reference will obstruct the vindication of the right to freedom. We see no reason to assume that this is so (*cf. Ex. parte Sharp*, 33 F. Supp. 464 (D. Kan.)). The procedure of referring issues to a commissioner in the Northern District of California was devised for the purpose of eliminating the genuine obstruction of delay in the disposition of a multitude of petitions for habeas corpus (see ~~(cf. Ex. parte Sharp, 33 F. Supp. 464 (D.~~ pp. 53, *supra*, 64, *infra*).

Second: If a reference is not incompatible with the hearing prescribed by the habeas corpus statute, we think it clear that the power to refer exists, as an aspect of the inherent power of federal courts "to provide themselves with appropriate instruments required for the performance of their duties (*Ex parte Peterson*, 253 U. S. 300,

312), a power broadly articulated in Rule 53 (a) of the Rules of Civil Procedure.[29]

Petitioner contends that if Rule 53 (a) is applicable the reference was nevertheless improper because there was no "showing that some exceptional condition requires it", as provided by Rule 53 (b).

Even if the point were valid, we think it would be insignificant at this stage. There was no objection to the reference to the commissioner either at the hearing or in court.[30] Under these circumstances, it is certainly too late to challenge the action of the court on a matter peculiarly within

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[29] Petitioner argues (Brief, p. 28) that Rule 53 is inapplicable, not only because a reference conflicts with the habeas corpus statutes—a contention which we have answered above—but also because the practice on habeas corpus has not, in this respect "heretofore conformed to the practice in actions at law or suits in equity" (Rule 81). We see no reason to doubt that the power before the Rules was as broad as that in equity; it was certainly broader than that at law since there is no right to a jury trial (*In re Neagle*, 135 U. S. 1, 75). Accordingly, if Rule 53 is inapplicable, we think the reason is that the *restrictions* of Rule 53 conflict with the flexibility implicit in the statutory mandate to proceed "in a summary way," not because Rule 53 would enlarge the procedural powers of a habeas corpus court. Cf. *White* v. *Johnston*, present Term, No. 697.

[30] It is doubtful also whether the point is included in the assignment of errors accompanying the petition for leave to appeal (R. 67, 74). If the first assignment, that the "Court erred in not issuing a writ of habeas corpus," can be read to attack the reference rather than the judgment, it plainly does not make the special point.

its discretion (see *Smith* v. *Brown,* 3 F. (2d) 926 (C. C. A. 5th); *cf. Eichberg* v. *United States Ship. Bd. Emer. Fleet Corp.,* 273 Fed. 886 (App. D. C.); *Coyner* v. *United States,* 103 F. (2d) 629, 635 (C. C. A. 7th); see also *Los Angeles Brush Manufacturing Corp.* v. *James,* 272 U. S. 701, 708). "We think that the parties should not be permitted to play fast and loose with the court, to speculate upon the chances of a favorable decision under the reference, and after final decision against them for the first time question the jurisdiction of the court to so act" (*Edwards* v. *La Dow,* 230 Fed. 378, 383 (C. C. A. 6th). Refusal to reverse the judgment on this ground is not "inconsistent with substantial justice" (Rule 61, Rules of Civil Procedure). In *McCullough* v. *Cosgrave,* 309 U. S. 634, the objection was timely and reversal avoided the reference.

Moreover, there is an "exceptional condition" well known to the District Court. From June 1, 1938 to April 1, 1941, there were 131 petitions for writs of habeas corpus filed in the Northern District of California by prisoners in Alcatraz Penitentiary, 75 based upon the decision in *Johnson* v. *Zerbst* and 3 upon the decision in *Walker* v. *Johnston.* Prisoners are sent to Alcatraz only if they are regarded as custodial problems, requiring maximum security. The hazards of escape are great and require unusual precautions for safe custody (see *Federal Offenders* (1938) p. 95; *ibid.*

(1939) p. 30; *Annual Report of the Attorney General* (1935 p. 151). These considerations constitute an "exceptional condition" and would, in our view, justify an order of reference. At the least, we do not see how it can be said that discretion was abused. Nothing in Rule 53 (b) indicates that the "exceptional condition" must appear of record when it is within the knowledge of the court.

3. THE PROCEDURE DID NOT OTHERWISE DEPRIVE THE PETITIONER OF ANY SUBSTANTIAL RIGHT.

Even if a reference was permissible, petitioner argues that there were other errors which require that the judgment be reversed.

First: It is urged that it was improper to hold the hearing before the Commissioner in the Administration Building of the Penitentiary at Alcatraz. We see no reason to believe that the place alone impaired the fairness of the hearing, which was conducted with scrupulous courtesy and respect for the petitioner's rights. The hearing was conducted by the Commissioner not by the officials of the prison. There is no support for the suggestion (Brief, p. 29) that the petitioner was handicapped by "the influence of his prison and warden" in any other sense than that he was a prisoner. That would have been no less true had the hearing been conducted across the bay. On the other hand, had it been conducted away from the prison, the custodial problem, to which we referred above, would obviously not have been met.

Second: It is urged that the court erred in making no findings of fact. We agree that findings are necessary (*White* v. *Johnston,* present Term, No. 697) but deny that they were not made. The Commissioner's findings were adequate; they support the judgment and are amply sustained by the evidence. This much, with a qualification noted below, the petitioner does not seriously dispute. The court approved the report and its opinion, which may be examined for this purpose (see *Babcock* v. *De Mott,* 160 Fed. 882 (C. C. A. 8th), certiorari denied, 212 U. S. 582), indicates that after an independent examination of the evidence it adopted the Commissioner's "findings and recommendation (R. 69). Rule 52 of the Rules of Civil Procedure, applicable in habeas corpus cases (*White* v. *Johnston, supra*) specifically provides that the "findings of a master, to the extent that the court adopts them shall be considered as the findings of the court" (see *United States* v. *Bethlehem Steel Corp.,* 26 F. Supp. 259, 261 (E. D. Pa.)).

Third: The return to the rule to show cause incorporated the "certificate" of the trial judge which recited that it was his invariable practice to inquire of prisoners appearing before him on felony charges whether they desired an attorney and, if so, to offer to appoint counsel; that he had no recollection of the petitioner's case but, in view of his practice and the length of the sentence, was certain that he made the inquiry before he permitted the plea to be entered. The Commissioner

summarized this certificate in his report (R. 29) in a section entitled "Evidence Presented By Respondent" (R. 28). In a section of the report entitled "The Law" (R. 31) he said: "Supporting affidavits are proper evidence in habeas corpus proceedings." Petitioner argues that the summary and the statement combined indicate that the Commissioner relied on the "certificate" as evidence to support the finding that the "Court in which sentence was imposed advised petitioner of his constitutional right to be represented by counsel" (R. 30), that the certificate was incompetent as evidence and that the error was perpetuated by the court in approving the report.

We think that the Commissioner's report is at least ambiguous as to whether he considered the certificate in evaluating the evidence. As the petitioner himself points out the certificate was not an affidavit and the questionable legal statement was limited to affidavits. The deposition of the United States Attorney who prosecuted the case, taken on notice, was introduced as evidence at the hearing (R. 19–22). It sufficed to sustain the finding as to the practice of the judge and the inference that the practice was followed in the particular case (*cf. Warszower* v. *United States,* No. 338, present Term, pp. 1–2). The "certificate", therefore, was cumulative at the most. Moreover, the opinion of the Court indicates, as we have said, that the findings of the Commissioner were approved after an independent examination of the evidence (R. 69);

the approval of the report certainly does not mean that every statement in it was followed by the court. In addition, the petitioner's own testimony was utterly implausible on the important point that he did not consult his attorney in Kansas City with regard to the plea he should enter or the alleged threats of the Government agents; it was inescapably evasive on the significant question of his familiarity with the indictment;[21] it was explicitly rejected in the findings on the claim that his acknowledgment of guilt was involuntarily signed (Fdg. 5, R. 30). We see no reason why it should have been believed on the question of his knowledge of the right to counsel (Cf. *Quock Ting* v. *United States*, 140 U. S. 417; *Chin Yow* v. *United States*, 208 U. S. 8, 11–12). Under these circumstances, we contend that even if the certificate was considered, there is no significant probability that the consideration affected the result. There is the final point that the record does not show that any objection to the report was made[22] (cf. *Home Land*

[21] Upon direct examination he was asked by his attorney whether the indictment was read to him "by the Clerk of the court" when he appeared and entered his plea. He replied that it was not (R. 40). Upon cross-examination he admitted that the indictment was read at that time by the United States Attorney (R. 50) and had also been read to him by the United States Commissioner before his removal from Kansas City (R. 55).

[22] We are advised that in fact petitioner's counsel did file a brief setting forth objections to the Commissioner's report. It was not urged that the certificate was inadmissible, though it was argued that the finding that petitioner was informed of his right should not be accepted on the evidence.

& Cattle Co. v. *McNamara,* 111 Fed. 822 (C. C. A. 9th), certiorari denied, 187 U. S. 642) or that error was assigned on this ground in the petition for leave to appeal. It can not be said that "substantial justice" requires a reversal on this ground (Rule 61, Rules of Civil Procedure).

Even if the finding that petitioner was informed of his right to counsel cannot be sustained in the present state of the record, it is enough to support the judgment that the findings explicitly reject the petitioner's testimony that his statement acknowledging his guilt was involuntarily signed (Fdg. 5, R. 30). The plain import of that finding is that petitioner's testimony that he was threatened was not believed or that the threats, if made, did not affect his behavior. Apart from the alleged claim of coercion, the petitioner's whole case would rest solely on the claim that he did not know and was not informed of his right to counsel. For the reasons set forth in Point I of this brief (pp. 28–45), he would not be entitled to relief even if he convinced the tribunal that such was the fact. Accordingly, it would not be ground for reversal of the judgment that the finding of an express waiver cannot be sustained.

Fourth: Petitioner contends, finally, that his rights were infringed because the procedure in the District Court denied him the opportunity to be heard on the approval of the Commissioner's report. Reliance is placed upon the statement in the petition for certiorari (on p. 3) that his at-

torney was never given notice that the writ of habeas corpus was denied. Reliance is also placed upon the statement in the petition for mandamus filed in the Circuit Court of Appeals on June 18, 1940, after the Commissioner's report had been filed in the District Court on May 23 (R. 26); that neither Judge Welsh nor the Commissioner had, to the petitioner's knowledge, taken steps to bring the proceedings in the District Court to a conclusion. But the record recites that on July 1, 1940, the report of the United States Commissioner "came on regularly this day to be heard" (R. 66). It would be immaterial that the petitioner was not advised of the filing of the report on June 18, if he or his counsel was subsequently advised prior to July 1. In this state of the record, we see no occasion to assume that the failure of petitioner's counsel to appear at the hearing on the report (R. 66) was occasioned by his lack of notice. We are advised that, in fact, petitioner's counsel had notice and filed a "Brief in Opposition to Report of United States Commissioner," a copy of which has been filed with the Clerk of this Court. Moreover, it is significant in this connection that the only objection to the findings which the petitioner now urges, the claimed reliance upon the certificate of the trial judge, is not sufficient to alter the result. Were this Court itself to consider the evidence (*cf. Chicago, Milwaukee &c. Ry.* v. *Tompkins*, 176 U. S. 167, 179; *Denver* v. *Denver Union*

Water Co., 246 U. S. 178, 182; see also *Givens* v. *Zerbst*, 255 U. S. 11, 21; *Johnson* v. *Sayre*, 158 U. S. 109, 115–116), we submit that it would have no alternative but to find that it sustains the judgment below.

We do not deny that the delay in the disposition of the petitioner's application for a writ of habeas corpus is incompatible with the statutory command that such applications shall be promptly determined. The delay which has already occurred is, however, irremediable. The judgment ought not to be reversed unless the petitioner's rights have been infringed in some other substantial respect. We do not think that such is the case.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should not be disturbed.

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APRIL, 1941.

APPENDIX

Constitution of the United States, Sixth Amendment:

ARTICLE VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Act of May 18, 1934, c. 304, Sec. 3, 48 Stat. 783 (U. S. C., Title 12, Section 588b):

> § 588b. *Robbery of bank; assault in committing or attempting to commit bank robbery.* (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less

than five years nor more than twenty-five years, or both.

§ 588c. *Same; killing or kidnapping as incident to robbery.* Whoever, in committing any offense defined in section 588b of this title, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

Revised Statutes, Section 754, U. S. C. Title 28, Sec. 454.

Application for; complaint in writing. Application for writ of habeas corpus shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application.

Revised Statutes, Section 755, U. S. C. Title 28, Sec. 455.

Allowance and direction. The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained.

Revised Statutes, Section 756, U. S. C. Title 28, Sec. 456.

Time of return. Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance and not beyond a distance of a hundred miles, within ten days; and if beyond the distance of a hundred miles, within twenty days.

Revised Statutes, Section 757, U. S. C. Title 28, Sec. 457.

Form of return. The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party.

Revised Statutes, Section 758, U. S. C. Title 28, Sec. 458.

Body to be produced. The person making the return shall at the same time bring the body of the party before the judge who granted the writ.

Revised Statutes, Section 759, U. S. C. Title 28, Sec. 459.

Day for hearing. When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time.

Revised Statutes, Section 760, U. S. C. Title 28, Sec. 460.

Denial of return; counter allegations; amendments. The petitioner or the party imprisoned or restrained may deny any of

the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained.

Revised Statutes, Section 761, U. S. C. Title 28, Sec. 461.

Summary hearing; disposition of party. The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

* * * * *

Rules of Civil Procedure, Rule 53, insofar as material provides:

(a) APPOINTMENT AND COMPENSATION.—Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. * * *

(b) REFERENCE.—A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

* * * * *

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(e) REPORT.

1. *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

* * * * *

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Rule 50 of the Rules of Practice of the District Court of the Northern District of California in so far as material provides:

When a writ of *habeas corpus* is issued in behalf of any person in the custody of any officer of the United States or of this State, the writ shall, unless otherwise ordered by the Court, direct that the custody of such person shall not be disturbed pending the determination of the proceedings under the writ, but the person having such person in

custody shall, when required so to do, bring him before the Court or Commissioner for the purpose of giving evidence, or in order that he may be present during the actual trial of the issues arising upon the petition for the writ and return thereto, and when his presence is no longer required before the Court or Commissioner, he shall be immediately returned to the custody of the person so producing him.

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pp. 4-6.

SUPREME COURT OF THE UNITED STATES.

No. 14, Original.—October Term, 1940.

Forrest Holiday, Petitioner, *vs.* James A. Johnston, Warden, United States Penitentiary, Alcatraz, California.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 26, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner applied to the District Court for the Northern District of California for a writ of *habeas corpus*. His petition alleged that he was unlawfully detained by the respondent in Alcatraz Penitentiary; that he had been indicted in the District Court for North Dakota under an Act of May 18, 1934, Sec. 2,[1] the indictment being in two counts, one for robbery of an insured bank and the other for jeopardizing the lives of officials of the bank in the course of the robbery; that he pleaded guilty to both counts and was sentenced to ten years under the first and to fifteen years under the second, "commencing at the expiration of the sentence imposed under count one." The petition charged that he was unlawfully detained because he was tried without the advice and assistance of counsel, was ignorant of his right to have counsel although unable to pay for an attorney, was not advised by the court that he was entitled to counsel, and was unable to, and did not, intelligently waive his constitutional right to have counsel. The petition alleged that the two counts of the indictment charged but one offense and that the petitioner was placed in double jeopardy by the imposition of the consecutive sentences.

The court issued a rule on the respondent to show cause why a writ should not issue. The respondent made return showing that the petitioner was held under a commitment issued pursuant to his conviction upon the indictment in question. He attached a certificate of the judge who imposed the sentence attesting to his uniform

[1] 48 Stat. 783, 12 U. S. C. § 588b.

practice of inquiring of prisoners charged with felony whether they wanted counsel and his firm belief that he so inquired of the petitioner, and the affidavit of a deputy marshal to the effect that petitioner said he did not desire counsel.

Petitioner filed a traverse in which he denied that the trial judge had interrogated him as stated and denied that he had made the alleged statement to the deputy marshal. The district judge issued a writ commanding the respondent to produce the petitioner before a commissioner of the District Court at the Alcatraz prison on a day named. This was done and the commissioner there took the petitioner's testimony and later received the depositions of two witnesses on behalf of the respondent. The commissioner submitted a report in which he recited his proceedings, summarized the asserted grounds for relief, made findings of fact, stated conclusions of law, and recommended that the application be denied. After hearing argument on the report the judge entered an order discharging the writ.

The petitioner applied for leave to appeal *in forma pauperis*. This was denied by an order which recited that, so far as the petition was based on the alleged invalidity of the sentence on the second count of the indictment it was premature and, so far as it was grounded on the deprivation of the assistance of counsel, the evidence sustained the finding of the commissioner that the petitioner had competently and intelligently waived his right to such assistance. Accordingly, the judge denied an appeal for want of merit in the application.

The petitioner moved the Circuit Court of Appeals for leave to appeal *in forma pauperis*, which was denied. He then petitioned this Court for certiorari[2] and for leave to proceed *in forma pauperis*. Both petitions were granted and counsel was appointed to represent him in this Court.

The burden of petitioner's complaint is that the procedure adopted by the District Court,—that of a hearing before a commissioner and the disposition of the cause on the record made before him—is a plain violation of the Acts of Congress regulating the practice in *habeas corpus* cases. In addition, he seeks a reversal of the judgment on the ground that the sentence on the

[2] We have jurisdiction under § 262 of the Judicial Code, 28 U. S. C. § 377; In re 620 Church Street Corporation, 299 U. S. 24.

second count is void. He insists that he is entitled to a decision to this effect so that he may apply for parole under the sentence imposed on the first count.

The respondent argues that we need not consider the question of the regularity of the hearing in *habeas corpus* since the petition should have been denied as premature so far as it rested on the asserted illegality of the sentence and since the District Court should have dismissed the petition for insufficiency of the allegations concerning the denial of assistance of counsel.

1. The respondent admits that § 2 of the Act of May 18, 1934, *supra*, does not create two separate crimes but prescribes alternative sentences for the same crime depending upon the manner of its perpetration. This concession, however, does not aid the petitioner. The erroneous imposition of two sentences for a single offense of which the accused has been convicted, or as to which he has pleaded guilty, does not constitute double jeopardy. And if, as the petitioner contends, the first sentence of ten years is valid and the second void, he is no better off. Conceding, without deciding, that he is right in saying the first sentence is the only valid one, he has not served that sentence and is not entitled now to be discharged from custody under it. He urges that if the second sentence is adjudged void he will now be entitled to apply for parole under the first. But we have recently decided that *habeas corpus* cannot be awarded to afford a prisoner such an opportunity.[3] His remedy is to apply for vacation of the sentence and a resentence in conformity to the statute under which he was adjudged guilty.

2. The respondent's contention that we should affirm the judgment because the petition for the writ insufficiently alleges a denial of constitutional right and fails to rebut the presumption of regularity which attaches to the record of petitioner's trial and conviction may be shortly answered. A petition for *habeas corpus* ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice. In the present instance, moreover, the judge, by calling on the respondent to show cause, adjudged that, in his view, the petition was sufficient and, by referring the cause to a master,

[3] McNally v. Hill, 293 U. S. 131.

evinced a judgment that the petition, the return, and the traverse made issues of fact justifying the taking of evidence. These decisions did not constitute an abuse of discretion and we will not review them.

"The respondent insists that the petition was premature if the petitioner's claim that he was denied the assistance of counsel is without merit, but the contention is pressed only if we find that no question as to such denial is presented."

void, nevertheless, the denial of petitioner's constitutional right would rob either sentence of validity.

4. We come then to the serious question in the case. Was the method of trial of the fact issues presented by the pleadings in accordance with law?

Revised Statutes §§ 757, 758, and 761[4] prescribe the procedure to be followed. The first requires that "The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party"; and the second that: "The person making the return shall at the same time bring the body of the party before the judge who granted the writ."[5] The third provides that: "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require".

It is plain, as the respondent concedes, that a commissioner is not a judge and that the command of the court's writ that the petitioner appear before that officer was not a literal compliance with the statute. The respondent argues, however, that the writ in effect referred the cause to the commissioner as a master whose function was to take the testimony and submit it, together with his findings and conclusions, for such action as the court might take

[4] 28 U. S. C. §§ 457, 458, 461.

[5] Both these sections are derived from the *Habeas Corpus* Act of February 5, 1867, c. 28; 14 Stat. 385. In the codification the language of the original statute was altered to indicate that the return might be made to the court, justice, or judge, whereas, in the original statute, the provision is that the respondent "shall make return of said writ and bring the party before the judge who granted the writ, and certify the true cause of the detention of such person" . . . 14 Stat. 386. Nothing in this case turns on the diversity between the language employed in the statute and that found in the revision.

upon such submission. The argument runs that this practice is in substance equivalent to a hearing before the judge in his proper person, has long been followed in the district courts in California, has not incurred the criticism of this Court in cases brought here where it was followed, is a convenient procedure, tends to expedite the disposition of such cases, is in accordance with long standing equity practice and is countenanced by Rule 53(a)(b) of the Rules of Civil Procedure.[6]

We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of *habeas corpus* in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done.[7] The Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.

The circumstance that the practice has grown up of referring such causes to a commissioner, has long been indulged in in the federal courts of California, and has found a place in a rule of court, cannot overcome the plain command of the statute. It is true that the practice was followed in certain deportation cases which were reviewed by this Court but, so far as appears, no point was made as to the procedure followed in those cases and the matter was passed without notice.

It may be that the practice is a convenient one but, if so, that consideration is for Congress. In view of the plain terms in which the Congressional poli y is evidenced in the *habeas corpus* act, the courts may not substitute another more convenient mode of trial.

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[6] 28 U. S. C. A. following § 723c.

[7] Johnson *v.* Zerbst, 304 U. S. 458; Walker *v.* Johnston, No. 173, October Term, 1940.

It is said that the procedure tends to expedite the disposition of *habeas corpus* cases. The record in this case would seem to contradict the argument.[8] And when it is remembered that R. S. 756[9] required that the return in this case be made within three days of the issue of the writ, and that R. S. 758, *supra*, required the respondent to produce the body at the same time he made the return; that R. S. 759[10] commands that the hearing shall be set not more than five days after the return; and that R. S. 761, *supra*, enjoins the judge to proceed in a summary way to hear the cause and dispose of the petitioner, it is difficult to see how the comparatively cumbersome and time consuming procedure of reference, report, and hearing upon the report, can be thought a more expeditious method than that prescribed by the statute.

The practice of referring equity causes to masters presents no persuasive analogy. The scope and purpose of the two proceedings are obviously different. Moreover, when Congress prescribed the procedure in *habeas corpus* the practice of reference to masters in chancery was well known to it. The legislature, nevertheless, saw fit to require a different procedure in *habeas corpus* cases.

Finally, the sanction by Rule 53 of the Rules of Civil Procedure of references to masters does not aid in the decision of the question presented.

[illegible] provides that appeals in *habeas corpus* cases are to be governed by the rules, but that the rules are not applicable "otherwise than on appeal" in *habeas corpus* cases "except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity" . . . . Since the practice in *habeas corpus* is set forth in plain terms in the Revised Statutes to which reference has been made Rule 53 has no application.

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[8] The petition was filed May 8, 1939. The order to show cause issued June 29, 1939. The return was presented July 10, 1939; the traverse July 31, 1939. The writ issued December 14, 1939. The commissioner held hearings on December 16, 1939, and April 30, 1940. He filed his report May 23, 1940, and the judge entered an order confirming the report and discharging the writ July 1, 1940. No explanation is vouchsafed for what seems, in view of the peremptory terms of the statute, an inordinate protraction of the proceeding.

[9] 28 U. S. C. § 456.

[10] 28 U. S. C. § 459.

In summary, we hold that the provisions of the *habeas corpus* act, as embodied in the Revised Statutes, are too plain to be disregarded for any of the reasons advanced. The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings. The petitioner has not been afforded the right of testifying before the judge, which the statute plainly accords him. In order that he may have that right we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion. We express no opinion as to the weight or sufficiency of the evidence heretofore adduced. The issues of fact will be for solution by the District Court upon a further hearing.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.